DUKE LAW

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October 13, 1999

MEMORANDUM

Re: Evaluation of Proposals by IOC and USOC to Reform their Doping Control Programs

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In preparation for my testimony on October 20, 1999, before the United States Senate Committee on Commerce, Science, and Transportation, I have reviewed the IOC and USOC proposals to reform their doping control programs. The evaluation which follows is based on the proposals contained in the following documents of the IOC and USOC, which were the most recent that I was able to obtain:

* With respect to the IOC, I have reviewed the document designated as "Draft 5 - 9th September 1999, Foundation: World Anti-Doping Agency - Statutes," and the document designated as the "Olympic Movement Anti-Doping Code 1999" with an effective date of January 1, 2000.

* With respect to the USOC, I have reviewed the *Special President's Newsletter Number Six*, dated September 28, 1999, and the *Report of the USOC Select Task Force on Drug Externalization*, dated September 30, 1999.

1. SUMMARY EVALUATION OF THE IOC'S PROPOSAL

The IOC's proposal can be easily characterized as yet another false start. It is primarily show over substance, and does not seriously respond to the public's call for the Olympic Movement's anti-doping program to be made independent of and externalized from the IOC and the subsidiary organizations within that Movement.

The proposal suggests the creation of a new entity that is not formally tied to the Olympic Movement, which it calls the "Foundation," but it does not give that Foundation any real authority whatever in connection with the Olympic Movement's anti-doping program. Thus, for example, the Foundation would not do or cause to be done scientific research relevant to the anti-doping effort; it would not develop a new drug testing program, even one based on the existing program; it would not do drug testing; it would not do sample analysis (or cause laboratories that it would accredit pursuant to standards that it would establish); it would not evaluate suspicious samples; and it would not prosecute athletes charged with positive tests. It would not even know about the existence either of suspicious samples or positive tests. In sum, the proposal suggests nothing more than the creation of a blue ribbon advisory board controlled by the IOC and its subsidiary organizations.

As I will detail below, the proposal suggests that the Foundation would have a hand in " supporting", "promoting", or "coordinating" aspects of the Olympic Movement's anti-doping efforts, but the responsibility actually to make decisions and to undertake the efforts would continue to reside exactly where they are today, namely with the IOC and the Olympic Movement generally. Put another way, the IOC's proposal would neither externalize nor make independent of that organization any significant anti-doping responsibilities.

When one considers the additional fact that the proposal suggests a governing structure for the Foundation that leaves the balance of power in the hands of the Olympic Movement so long as it is willing to pay for that power (quite literally), the illusory nature of the proposal as a whole becomes crystal clear.

A. <u>The Principal Merits of the Proposal</u>

Having said this, the IOC's proposal does contain one positive aspect: It reflects that, for the first time, the IOC is willing to consider some truly independent observation of and participation in some aspects of the Olympic Movement's anti-doping program. It does this by allowing for individuals on the Foundation's Board to be "designated by the intergovernmental

organizations, governments, public authorities or other public bodies involved in the fight against doping."

B. The Principal Defects of the Proposal

As I suggested above, the principal and overriding defect of the IOC's proposal is that it neither externalizes nor makes independent of the IOC or the Olympic Movement any significant aspect of the anti-doping program. As I will detail below, the Foundation would neither have the independent authority to do anything -- apart from "promoting" anti-doping efforts, and " recommending" measures to the IOC, for example -- nor would its governing Board be independent of the IOC or the Olympic Movement, as it is explicitly contemplated that the balance of power would remain with the IOC so long as that organization was willing to pay for it. Needless to say, given that the calls for reform uniformly required both externalization and independence of the anti-doping program, this proposal is a non-starter. Given this, it is my view that the proposal is not even a good-faith effort to respond to those calls for reform, and cannot legitimately be the basis for an honest negotiation between the IOC and those in and out of government who seek that reform.

* The Foundation would be located in Switzerland, the seat of the IOC. To the extent that the appearance of independence matters, this is not an appropriate situs for the new agency.

* The Foundation would not assume the doping control responsibilities of the Olympic Movement. Indeed, it appears that all the Foundation would be authorized to do would be to " promote", "coordinate", and "reinforce", "encourage," and "support" the anti-doping efforts of others, and to "organize" persons and entities interested in the fight against doping. Reading the Foundation document together with the proposed Anti-Doping Code, it becomes clear that any real authority the Foundation might have is illusory, as the Code repeatedly refers to the Foundation's ability only to "recommend" anti-doping measures to the IOC's Executive Committee, including updates to the list of prohibited substances and standards for laboratories. . Ultimately, the significance of this lack of authority is that the IOC's proposal does not contemplate the externalization of any significant aspect of its anti-doping program.

* The Foundation Board would be comprised of at least thirteen individuals from the Olympic Movement, including six designated by the IOC itself (three presumably by its Executive Committee or President, and three by its Athletes' Commission), three from the International Federations, and three from the Association of National Olympic Committees. The document specifically provides that there will be an equal allocation of power on the Board between those members who are from the Olympic Movement and the public authorities who would comprise the remaining members. Again, to the extent that the reform effort is intended to result in independence from the stakeholders, this is not accomplished in the IOC's proposal.

* The Foundation document also specifically provides that members from the Olympic Movement would out-number the public authority members by at least one so long as the Olympic Movement contributes more of the operating budget of the Foundation relative to the contributions of the public authorities or others. The Foundation Board also would be authorized to select its own "chairman," etc. Because Mr. Samaranch has already announced that in exchange for a seat on the Board, he intends to contribute $25 million from the IOC's coffers to start the Foundation, unless the public authorities or others are willing to ante up $25 million plus $1, the Olympic Movement and perhaps even Mr. Samaranch himself will control the Foundation. This result would bring the matter of the Olympic Movement's anti-doping program back to ground zero, and nothing will have been accomplished.

* The Foundation Board is required to meet only once a year. Given the complexity and multitude of problems that need to be addressed, this is clearly insufficient. Moreover, when considered in conjunction with the provisions that would establish an Executive Committee of the Board, which would actually run the Foundation, it is at best unclear that the Board is intended to do anything of real substance.

* The Foundation would be entitled but not required to act in consultation with legal and scientific advisors. Given that the issues that plague the Olympic Movement's anti-doping program lie squarely at the intersection of law and science, it must be required to act in consultation with such experts.

* The Foundation would be required to publish reports of its activities only once each year. Given that transparency is a real concern, this proposal is certainly deficient.

* The proposal contemplates that "the actual management and running of the foundation" would be done by an Executive Committee of the Board, comprised of five-to-nine members selected by the Board itself. Assuming that the majority of the Board is comprised of individuals from the Olympic Movement, it is entirely possible, if not probable, that the entire composition of the Executive Committee would be individuals from the Olympic Movement. Again, this is back to ground zero; nothing will have been accomplished.

2. SUMMARY EVALUATION OF THE USOC'S PROPOSAL

In stark contrast to the IOC proposal, it is clear from the text of the USOC's proposal that at least its Task Force on Drug Externalization is seriously committed to effective drug testing, and to the principle of externalization. In this latter regard especially, the USOC's proposal is strong: It contemplates the externalization of <u>all</u> aspects of the USOC's anti-doping efforts. Thus, the Task Force has suggested that the new agency would have all the authority that the USOC itself now has, in conjunction with the NGBs, to undertake or commission relevant research; to conceive an effective drug testing program; to do drug testing; to investigate suspicious samples; and to prosecute athletes whose samples are positive. It is evident that the Task Force has done a thorough and thoughtful job in proposing its version of a new anti-doping program to the Executives and the Board of the USOC. Thus, while this proposal is defective in certain respects which are important and which I detail below, it is in general a very good beginning, and the Task Force ought to be commended on its effort.

A. <u>The Principal Merits of the Proposal</u>

* The domestic anti-doping program would be completely externalized (with the exception of laboratory analysis).

* The NGBs also would be out of the business of drug testing and particularly of prosecuting their own athletes.

* Substantial monies would be devoted to the effort, including money for peer-reviewed

research, especially relating to the endogenous substances, EPO, hGh, and testosterone.

* All sample collection and testing would be conducted in accordance with the relevant International Standards Organization (ISO) Standards.

* There would be a substantial increase in no-notice testing of athletes who are subject to the anti-doping program.

* The adjudications process would be developed independently of the Olympic Movement, namely by AAA in conjunction with CAS.

* All drug testing results should be screened by experts for probable cause before a prosecution is commenced; and that the work of the new agency should be transparent.

* That positive and prophylactic educational measures are essential to reinforce the ethical culture of young athletes in particular.

* That a partnership with Olympic sponsors and the Federal Government is appropriate in this area.

B. The Principal Defects of the Proposal

The principal defect of the proposal is actually its Achilles Heel; if it is not remedied, all other reform risks being illusory: While the Task Force, with the apparent support of President Hybl, has proposed externalization of all drug testing operations, it has failed simultaneously to provide for independence for the new agency that would administer them. Specifically, by proposing that all members of the board of the new agency are to be selected from among members of the USOC or by members of the USOC, the Task Force in essence has proposed the creation by the USOC of a wholly-owed (and controlled) subsidiary. This formula would guarantee that the stakeholders in the enterprise will continue to govern the new agency. Stakeholder control of Olympic drug testing has in principal part caused the drug crisis with which we are faced with today; to permit continued stakeholder control of the new agency would be to perpetuate the status quo.

The proposal's other principal defects include:

* Its failure to provide an opportunity for the public, including government officials and others, to comment on the details of the new agency's proposed structure, responsibilities, and procedures, including its adjudications procedures, as the proposal is being developed and before it is implemented. While the Task Force is certainly comprised of qualified and thoughtful individuals, they do not represent the spectrum of interests and experience that is necessary to assure the best program possible. And the USOC itself is similarly handicapped.

* Its failure to detail how the new agency would be staffed; again, the significance of complete independence from the Olympic Movement in this regard is critical to the success of the effort.

* Its failure to detail how the "highly-qualified [scientific] experts" who will advise the new agency in several respects are to be selected. This has been a problem for the USOC in the past, as it has tended to use only experts who were part of the Olympic Movement or at least not in conflict with the larger (economic) interests of the Movement. The new agency must be required to develop a list of experts who are unassailably independent, specialized in the appropriate respects, and otherwise highly-regarded in the larger scientific community.

* Its inclusion of the current IOC laboratories in its proposed distribution of research monies. These laboratories are fraught with conflicts-of-interest which have been largely responsible for the current system's failures: they make their money developing tests for prohibited substances for the Olympic Movement, processing urine samples, and defending both their tests and the sample processing as part of any subsequent prosecution. Moreover, because they are heavily invested in their existing scientific positions, many of which have been subject to legitimate challenge, it is likely that they would expend at least part of any research monies given to them under this new program to shore up those positions, rather than to work toward an independent view of their merits or flaws. Finally, these laboratories have, with some exceptions, typically refused to have their research and conclusions peer-reviewed.

* Its failure to address squarely the problem of endogenous substances. The USOC has acknowledged that its procedures (handed down by the IOC and the IF's) for detecting the use of

testosterone, EPO, and hGh are either flawed or non-existent. Nevertheless, it continues to list these as prohibited substances and, in the case of testosterone and possibly EPO, it continues to subject athletes to prosecution under the current flawed procedures.

While including these substances on the prohibited substances list may be justified for its *in terrorem* effect, there is no justification for prosecuting or allowing the prosecution of athletes based on flawed scientific theories. To do so in circumstances where it knows that the theories are defective is not only reckless, but also in flagrant disregard for its statutory authority to protect the rights of athletes to compete.

Additionally, such prosecutions do (in the case of testosterone) and will (in the case of EPO and hGh) to burden both the system and the athletes with fatally defective allegations, and ultimately tarnish the integrity of the entire system. (It is no justification that these flawed procedures are all that exist.)

On the other hand, because the endogenous substances appear to be the drugs-of-choice among some elite athletes, it is critical that the initial research efforts be concentrated in these areas, so that, if possible, iron-clad tests for the detection of the use of these substances are developed. Alternatively, until such a test is developed, some other less punitive sanction should be conceived for a suspicious sample that does not include the unfair stigma of a public charge of doping.

* Its failure to provide defense counsel and related expertise for athletes who cannot afford their own. Athletes who are well-known and who have money have a significant advantage in drug testing proceedings, principally because those proceedings often require expert testimony to counter the prosecution's own expert witnesses. The system will not be fair unless all athletes are afforded at least a competent defense.

* Its failure to assure that all athletes similarly-situated are treated similarly in the adjudications process. It is essential to the fairness of the new system that all athletes are treated consistently. The proposal also fails to ensure that, in developing the new adjudications process, AAA and CAS will be required to develop a system of precedents. Incredibly, the proposal also

affirmatively proposes that arbitrators in individual cases be permitted to set the burden and standard of proof. The standard and burden of proof must be uniform across all cases; the burden must be on the prosecutor; and at least until we are confident that the science, collections, transport, and analysis that are involved in drug testing cases are strong enough to reduce to almost zero the possibility of false positives, the burden must remain as it is in the existing rules, " beyond reasonable doubt," The Olympic Movement is plagued by the legitimate criticism that it is arbitrary in the manner in which it handles drug testing cases, favoring some athletes in some circumstances, disfavoring others athletes in other circumstances. The principal cure for this is the establishment of a fair adjudications process, based on precedents and a uniformly-applied standard and burden of proof "beyond reasonable doubt."

* Its continued reliance on the "standard documentation package" for purposes of evaluating probable cause, etc., that an athlete has engaged in doping. This "standard documentation package" is referred to in various existing documents having to do with the obligations of the Olympic Laboratories and the USOC to provide information about the analysis of a sample to the NGB and the athlete at issue. (I do not know whether it is an IOC term or one devised by the USOC). This package is almost always materially deficient, as it generally contains only the bare minimum of information. Athletes subject to doping charges routinely and reasonably demand all of the documentation relevant to their sample. The inherent unfairness of denying an athlete access to all such information (some of which might be exculpatory) currently results in an almost routine determination (by the relevant hearing panel or the NGB, for example) that the laboratories should provide that additional information. This document production is typically done piecemeal, thereby delaying the resolution of doping cases. Thus, while there is nothing wrong with the term "standard documentation process," its meaning must be understood to include all documents that are relevant to the testing and investigation of a suspicious sample.

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